11/29/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City and County of Honolulu's Honouliuli Wastewater Treatment Plant,	)	Docket No. NPDES-09-92-0001
	)	
	)	
Permittee	)	

ORDER DENYING MOTION FOR PARTIAL SUMMARY DETERMINATION

Under date of November 8, 1993, the City moved for a partial summary determination on Issues Nos. 1 and 7 which are defined as follows:

1. Whether as a matter of fact and of law a flow rate limitation is required to be included in the permit in order to comply with the criteria for granting a section 301(h) waiver.

7. Whether permit provisions for ocean monitoring are adequate to assess the effects of the discharge.

With respect to Issue No. 1, the City says that this issue arose, because the draft permit issued by EPA contained a maximum flow limit. During the lengthy public comment period, the Hawaii Department of Health asked that the flow limit be deleted. The City states that EPA agreed and elected to regulate the amount of pollutants allowed to be discharged solely through the use of "mass emission rates" ("MERs"). MERs place limits on the mass of pollutants, such as suspended solids

(SS) that can be discharged during a given period of time. The City recites that MERs are calculated by multiplying a given flow rate, such as gallons per day, times a given concentrations, e.g., grams per gallon, resulting in a limit expressed as a mass per day, such as kilograms of SS per day. This regulates the actual quantity of pollutants discharged, rather than the quantity of the flow which contains the pollutants. According to the City, neither the Act nor EPA's regulations require a flow limit, a flow limit is not required as a matter of law and its motion for a summary determination should be granted on this portion of Issue No. 1.

The City states that Petitioners raised Issue No. 7 in their request for an evidentiary hearing. Because this issue concerns the adequacy of a condition contained in the permit, rather than whether the city has demonstrated that it qualifies for a permit under section 301(h), the City, citing 40 CFR § 124.85(a)(3), says that Petitioners bear the burden of proof. The City points out that none of Petitioners' witnesses mentioned the adequacy of the ocean monitoring provisions, asserts that Petitioners have not sustained their burden of proof and urges that its motion for summary determination on this issue be granted without delay.

Petitioners' Opposition

Petitioners filed a memorandum in opposition to the City's motion for summary determination on November 18, 1993 ("Opposition"). Petitioners assert that the City has completely mischaracterized the "flow rate issue" upon which the evidentiary hearing was granted, pointing out that the Agency, in its letter of July 31, 1993 [1992], granting the request for an evidentiary hearing, stated that the issue has two essential components, the first being the factual question of whether proper flow rate data were used in making various calculations which are dependent on flow rates, and the second being the mixed question of law and fact as to whether a flow rate limitation should be imposed in the permit. The latter question requires consideration of whether a flow rate limitation is required as a matter of law and, based on a factual inquiry, whether it is the most appropriate method for achieving compliance with the criteria for granting a waiver of the requirement for secondary treatment in accordance with section 301(h) of the Act. The Agency assertedly recognized that this issue was material, because it concerned both whether the 301(h) criteria have been met and whether additional permit terms were required.

Petitioners argue that given the imminence of the evidentiary hearing, these sub-issues, requiring a mixed law and fact determination, must await compilation and review of the complete record. Petitioners point out that, in order to defeat

the City's motion, they need only present sufficient probative evidence from which a reasonable decision-maker could find in their favor by a preponderance of the evidence.[1/] They say that a party seeking summary judgment bears the burden of demonstrating that there is no genuine issue of material fact and argue that the City has failed to sustain its burden.

Petitioners point to certain exhibits which allegedly would support a finding that the City mislead EPA by presenting overly conservative flow projections in support of its 301(h) application.[2/] According to Petitioners, the City's motion utterly fails to grasp the nature of, let alone defeat, the first prong of Issue No. 1 upon which they have been granted an evidentiary hearing.

As to the second prong of Issue No. 1, Petitioners assert that the City failed to recognize that the issue is a mixed question of law and fact, and argue that section 301(h) regulations do support their position that a flow rate is an

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[1/] Petitioners cite Mayaguez Regional Sewage Treatment Puerto Rico Aqueduct and Sewer Authority, NPDES Appeal No. 92-23 (EAB, August 23, 1993), wherein the EAB adopted the standard set by the Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1985), with regard to motions for summary judgment.

[2/] Petitioners quote the testimony of one of their witnesses, Dr. Bruce Bell, which indicates the City intentionally withheld from EPA higher flow projections, apparently hoping to amend the permit after it was issued.

appropriate and meaningful permit provision for a 301(h) permit.[3/] Moreover, although 301(h) criteria expressly disfavor the allowance of increased pollutant loadings, Petitioners allege that pollutant limits in the permit issued to the Honouliuli WWTP were not based on the 25 mgd design capacity of the plant, but on an expanded plant not then in existence.[4/] Petitioners assert that EPA's decision flies in the face of the section 301(h) criteria and that summary determination of this fact-bound issue would be completely inappropriate.

Petitioners allege that the City has mischaracterized Issue No. 7 as a very narrow one and insist that the adequacy of the ocean monitoring provisions of the permit remains hotly disputed. It is pointed out that section 301(h)(3) places a heavy burden on the applicant to demonstrate that it has established a system for monitoring the impact of the discharge and conducted scientific investigations which are necessary to study the effects of the proposed discharge. Petitioners further note that in its decision granting an evidentiary hearing EPA recognized the importance of the ocean monitoring

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[3/] For this assertion, Petitioners rely on the section 301(h) criteria set forth in Part 125, Subpart G, which, inter alia, require compliance with the general permit requirements of Part 122 and upon City & County of San Francisco, NPDES Appeal No. 91-18 (EAB, March 24, 1993) (mass limits must be based on flow limits).

[4/] The permit provides that discharge limitations (MERs) for BOD_5 and SS are based on a flow rate of 25.08 mgd (Id. at 57). Petitioners state that a 13 mgd primary-level expansion of the plant has been completed since the permit was issued.

issue, because of Petitioners' concerns that "ocean currents, Kona winds and the effects of upwelling" had not been properly analyzed with the net effect that there would be greater [than anticipated] impacts on near-shore aquatic life and recreational uses.

Petitioners refer to testimony of two of their witnesses, Drs. Douglas Segar and Scott Jenkins, which is to the effect that current studies performed at and near the Honouliuli outfall are inadequate, that Dr. Noda's modeling results as to the fate of the plume are flawed and that available data actually show a significant likelihood of shoreward transport [of the discharge or particles thereof]. Accordingly, Petitioners contend that the City has failed to properly study the fate of the plume and has seriously underestimated the risk [of the Honouliuli discharge] to the environment and public health. Petitioners argue that the City has failed to demonstrate that it is entitled to summary judgment and that the City's motion should be denied.

D I S C U S S I O N

Although Petitioners appear to acknowledge that nothing in the Act or regulations expressly requires that the permit contain a flow limitation, their basic position is that a flow limit is appropriate and, indeed, required under the facts and circumstances present here. The regulation clearly requires that NPDES permits, including modified permits issued under

section 301(h), contain mass limitations and it is equally clear that flow rates must be used to calculate mass limits. The regulation, 40 CFR § 125.67(a) requires that each section 301(h) modified permit contain "(a) (e)ffluent limitations and mass loadings which will assure compliance with requirements of this subpart." Sections 125.59(b) and 125.67, in effect, require that section 301(h) permits comply with Part 122 and contain all applicable terms and conditions required by that part.

Section 122.44(i), "Monitoring requirements," provides that "(t)o assure compliance with permit limitations [permits shall contain] requirements to monitor: (1) the mass (or other measure specified in the permit) for each pollutant limited in the permit, (ii) (t)he volume of effluent discharged from each outfall. . ." Additionally, 40 CFR § 122.45(b)(1) provides that "(i)n the case of POTWs, permit limitations, standards, or prohibitions shall be calculated based on design flow." Sections 122.45(d)(2) and 45(f)(1) in turn provide, respectively, the former applicable to continuous discharges, that permits shall contain "(2) (a)verage weekly and average monthly limitations for POTWs" and "(f)(1) Mass limitations. (1) (a)ll pollutants limited in permits shall have limitations, standards or prohibitions expressed in terms of mass except. . ." The exceptions are not applicable here.

The cited provisions of the regulation are to be considered in conjunction with section 125.65(a) which provides that "(n)o modified discharge may result in any new or substantially

increased discharges of the pollutant to which the modification applies. . ." and of section 125.65(c) which provides that "(t)he applicant shall provide projections of effluent volume and mass loadings for any pollutants to which the modification applies in 5-year increments for the design life of its facility."

As Petitioners point out, the Regional Administrator, in granting an evidentiary hearing on Issue No. 1, recognized that it involved more than the question of whether the Act or regulation expressly required that the permit contain a flow limit. The first prong of this issue is whether mass limits were correctly calculated and the requirement that the permit contain mass limits based on design flow of the plant has been circumvented, if, as Petitioners allege, mass limits in the permit were calculated based on an anticipated expansion of the plant. Section 122.44(i), requiring monitoring of, inter alia, the volume of effluent discharged from each outfall, provides a means of checking the mass limits in the permit. Moreover, the requirement of section 125.65(a) that the modified discharge not result in any new or substantially increased discharges of the pollutant to which the modification applies seemingly precludes substantial expansion of the plant. Under these circumstances, it may well be that a flow limitation is or should be required in order to assure compliance with section 301(h) criteria. In any event, a determinative ruling on this issue must await full

exposition of the facts and the motion for a partial summary determination on this issue will be denied.

As to the City's motion with respect to the ocean monitoring provisions of the permit, Petitioners have persuasively argued that these provisions are indeed contested. Moreover, it is my conclusion that these provisions are closely, if not inextricably, related to the BIP and recreational activities requirements and to demonstrating compliance with such requirements. The motion for a summary determination on this issue will be denied.

O R D E R

For the reasons indicated, the City's motion for a summary determination is denied.

Dated this 29th day of November 1993.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION FOR PARTIAL SUMMARY DETERMINATION**, dated November 29, 1993, in re: City and County of Honolulu's Honouliuli Wastewater Treatment Plant, Dkt. No. NPDES-09-92-0001, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Permittee and EPA (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: November 29, 1993

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*** COPIES WERE ALSO FAXED.**